In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 881

RALPH SHUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by the court without a jury in the United States District Court for the Middle District of North Carolina of possessing whiskey in containers on which revenue stamps had not been placed, in violation of 26 U.S.C. 5205(a)(2) and 5604 (a)(1). He was sentenced to imprisonment for a period of five years (1 R. 7–8; 3 R. 6, 64–65, 78). The court of appeals affirmed (Pet. 2).

The sole question presented is whether the court should have sustained the motion by petitioner and his co-defendant to suppress as evidence whiskey and distilling equipment seized at the time of their arrest without a warrant. By agreement, the evidence on this

issue was heard at the same time as the trial before the court (3 R. 9). Agent Carter of the Alcohol and Tobacco Tax Division testified that on the evening of December 5, 1966, he and two other agents went to a farm leased by co-defendant Holloway in Wilkes County, North Carolina. From a concealed position, Carter observed a dilapidated house about 250 yards from the Holloway house, next to which a truck had drawn up. The truck moved over to the Holloway house and somebody in the truck handed up to the second story or attic of the house what appeared to be five-gallon cans (3 R. 10–12, 62–63). The truck then left the premises. About thirty minutes later the same or a similar truck entered the premises and a large number of cardboard cartons of the size and shape used for containing several one-gallon plastic jugs were handed up to the attic of the Holloway house. Other movements between the two buildings were seen during the course of the night (3 R. 12–13).

About four o'clock in the morning, a passenger car drove into the yard. Someone removed a metal drum and took it into the house. The sound of bumping cans was heard and Carter detected the odor of distilled spirits (3 R. 13–15). At about six o'clock, a 1966 Plymouth convertible was driven in and backed up to the front porch. Carter moved in closer and saw petitioner standing by the open trunk of the car, which contained several cardboard cartons. Carter ran up and told petitioner he was under arrest. Petitioner dropped the carton he was holding and started running. Carter caught him after a short distance and

brought him back. Six one-gallon jugs had fallen out of the carton which petitioner had been holding. Seven more cartons containing non-taxpaid distilled spirits were on the front porch. Carter entered the house and placed Holloway under arrest (3 R. 15–17). Carter and the other agents, who had now joined him, searched the house and found 95 gallons of non-taxpaid liquor. An unlicensed distillery was found in the dilapidated house (3 R. 16–19).

The district court denied the motion to suppress, finding that the arrest of petitioner and the search of the Plymouth were lawful. It also concluded that the agent had the right to enter the house and arrest Holloway and to search the house incident to that arrest (3 R. 61–64). The court noted that it was immaterial to a decision of the case whether the officers lawfully searched the upstairs of the house where additional whiskey was found, since the whiskey found in the trunk of the Plymouth, on the ground and on the front porch clearly sustained the charge (3 R. 61–62).

The agents had statutory authority to arrest without a warrant on probable cause to believe that petitioner and his confederate were committing a felony in violation of the liquor laws. 26 U.S.C. 7608. The facts recited above amply established probable cause for petitioner's arrest. Seizure incident to this arrest of non-taxpaid whiskey in the open automobile trunk, on the ground and on the front porch did not even involve a search since the material was fully exposed

to view. *Hester* v. *United States*, 265 U.S. 57; *Ker* v. *California*, 374 U.S. 23, 36–37.[1]

Petitioner seeks to focus attention upon the claimed illegality of the seizure of additional non-taxpaid whiskey within the Holloway house. Since this seizure was clearly incident to the arrest of Holloway, the situation here is distinguishable from that in *Jones* v. *United States*, 357 U.S. 493, 497, upon which petitioner appears to rely (see Pet. 9). In any event, the trial court here expressly stated that consideration of this evidence was unnecessary to its determination of petitioner's guilt (*supra*, p. 3). Thus, *Johnson* v. *United States*, 333 U.S. 10, which involved a warrantless search of a home, is similarly inapposite here, and petitioner's reliance thereon (Pet. 10–11) is misplaced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1968.

[1] That petitioner might have had standing to move to suppress evidence illegally seized from the Holloway premises, under *Jones* v. *United States*, 362 U.S. 257, 267 (see Pet. 7), is irrelevant where, as here, no search occurred. As the court of appeals stated, "When [the agents] entered upon the curtilage, the defendant was in plain view on the porch. There was no search of him" (Pet. 2).

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